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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~111~~ 119.

THE WESTERN UNION TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES E. HUGHES.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED SEPTEMBER 29, 1905.

(19,913.)

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1 In the Supreme Court of Appeals of Virginia, at Richmond.

WESTERN UNION TELEGRAPH COMPANY
vs.
HUGHES.

To the honorable judges of the supreme court of appeals of Virginia:

The petition of the Western Union Telegraph Company respectfully shows unto this honorable court that the petitioner is aggrieved by the judgment entered in the corporation court of Danville, Virginia, on January 9, 1904, during the January term of said court, in the action at law wherein C. E. Hughes was plaintiff and your petitioner was the defendant, and in which action the said plaintiff was seeking to recover against the defendant the penalty of one hundred dollars ($100) imposed by sections 1291 and 1292 of the Code of Virginia of 1887, prescribing a penalty for the failure to transmit and deliver dispatches in the manner and time as set forth in said sections. The case was duly matured at rules, and came on for trial at the said January 1904 term of the court, and the court on the day and year first aforesaid rendered a judgment against the defendant company for the penalty of one hundred dollars ($100) and interest thereon from the day the judgment was rendered, and costs to the plaintiff. The case was heard on the declaration of the plaintiff and the demurrer and *nil debit* of the defendant and the facts certified, as the record presented with this petition will show. The facts were agreed between the parties, and the whole case upon the pleadings and the agreed facts was submitted to the judge of the corporation court for consideration and decision. The telegram upon which the action was founded and which was copied into the declaration, omitting the printed matter on the telegraph blank, is as fol-
2 lows, and was directed from Danville, Virginia, to Pocahontas, Virginia, on the 2nd day of November, 1903.

NOVEMBER 2, 1903.

Miss Isabelle Malone, Pocahontas, Va., care Pocahontas inn.

Mother taken sick Saturday night, am afraid fatal attack, wrote you yesterday, come if can.

C. E. HUGHES.

At the trial of this action the agreed facts as certified by the judge are as follows:

1. That the message from Danville, Virginia, to Pocahontas, Virginia, was delivered to the defendant company at Danville, Virginia, at 8 o'clock a. m., on November 2, 1903.

2. That it was sent to and received at Richmond, Virginia, at 8.20 o'clock a. m., on November 2, 1903.

3. That it was sent from Richmond to Bluefield, West Virginia, and was received at Bluefield, West Virginia, at 9.05 a. m., on the said 2nd day of November 1903.

4. That the message was never received at Pocahontas, and was never delivered to the sendee, Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Virginia, or to any one for her, or to her at any other place, but it was sent by the only possible route, from Danville, Va., to Pocahontas, Va., that is by Bluefield, West Virginia.

5. That the plaintiff, C. E. Hughes, had an account with T. P. Kinney, the agent of the defendant company at Danville, Virginia, that telegrams sent by the said Hughes should be charged to him on said account, and although the said Hughes did not pay for the said telegram at the time of delivery at Danville, Virginia, yet it was charged in said account and was afterwards paid for by said Hughes before this action was brought. The defendant contended that under the penal statute, the failure to pay for the message in cash defeated the action. The plaintiff contended before the judge of the court who tried the case that the case was ruled by the
3 case of The Western Union Telegraph Company vs. Reynolds, decided by this court June 19, 1902, and the defendant company contended that the case should be ruled by the case of Hanley vs. Kansas City Southern Ry. Co. 187 U. S. p. 617, decided January 5, 1903. The Reynolds case was dismissed for want of jurisdiction, because the amount involved was not large enough to give jurisdiction to this court, but the case discusses other matters and refers to the case of The Lehigh Valley R. Co. vs. Pennsylvania 145 U. S., 192, and of this we shall have more to say further on in this petition.

The Reynolds case was decided under the old constitution, which in article VI, sec. 2, says, of the court of appeals:

"It shall have appellate jurisdiction in civil cases except in cases of *habeas corpus*, mandamus and prohibition. It shall not have jurisdiction in civil cases where the matter in controversy exclusive—costs is less in value or amount than five hundred dollars ($500), except in controversies concerning the title or boundaries of land, the probate of a will, the appointment or qualification of a personal representative, guardian, committee or curator, or concerning a mill, roadway, ferry or landing, or the right of the corporation or the county to levy tolls or taxes, and except in cases of *habeas corpus*, mandamus and prohibition or the constitutionality of a law."

And by section 3455 of the Code of Virginia of 1887, there is added to the grounds of appeals "or some matter not merely pecuniary."

This court has held that the meaning of the words "not merely pecuniary," apply only to such matters as are specified in the constitution and this ruling we think needs no citation of authority, but we cite 93 Va., p. 16, Price vs. Smith.

The present constitution of Virginia, which went into effect July 10th, 1902, is the law of the State under which this case was tried and under art. VI, sec. 88, 2nd paragraph, this provision for the

court of appeals is made: "subject to such reasonable rules as may be prescribed by law as to the course of appeal, the limitation as to time, the security required, if any, the granting or refusing of appeals, and the procedure therein, it shall, by virtue of this constitution, have appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the constitution of this State or of the United States, or involving the life or liberty of any person."

So it will be perceived that the matter of the constitutionality as referred to the Constitution of the United States, of any law,
4 was not granted in terms in the old constitution, but is granted in the one under which we now live, and the petitioner contends now as he contended before the judge of the corporation court, that the agreed facts of the case under the authority of the Hanley case, above cited, raised the constitutionality of sections 1291 and 1292 of the Virginia Code, and said sections should by the court have been held unconstitutional, and therefore a judgment for the defendant should have been rendered.

This court in the case of The Board of Supervisors vs. Catlett's Ex'ors, 86 Virginia, 158, decided:

"Where the case is presented here on the same record of pleadings and exhibits as was presented in the court below this court can adjudge the case on its merits, though no exceptions were taken to the action of the court below."

The court will observe from the record with this petition that no exceptions were taken during the term of the court, but it may be noted in passing that that fact came about because the clerk of the court, to whom the exceptions in writing were handed, and he was asked to hand them to the court when the judge came in, was taken sick and left his office and forgot to give the exceptions to the judge, but after the term of the court and within the limitation of thirty days prescribed by the Acts of Assembly of February 15, 1901 (extra session 1901, p. 186, amending section 3385), the appellant did present and have signed the bill of exceptions now with this record and the certificate of the facts of the case, as to which there was no dispute, as they were agreed as aforesaid. This, we contend, brings us clearly within the protection of The Board of Supervisors vs. Catlett's Ex'ors, just above referred to. This case, it will be observed, was submitted to the judge on the pleadings and facts (not evidence), and there was nothing for the judge to do but to pass upon the law that applied to that state of facts.

In the case of Cheatham vs. Cheatham and others, 30 Grattan, 56, Judge Staples decided:

"Where the whole matter of law and fact is submitted to the court below and its decision is based upon the mere *credibility* of witnesses, it will not be *distributed* by the appellate court unless palpably wrong."

This case is referred to in the case of Smith vs. Hutchinson and

others, 75 Virginia, p. 690, and in the latter case the court quotes the language of Judge Staples in the Cheatham case, and adds:

5 "But this principle is not applicable in a case where the decision of the lower court proceeds, not upon the *credit* to be given to witnesses, but upon the *rule of law* supposed by it to be correct, but in fact erroneous."

The petitioner has always understood that there is no difference in principle or in practice between a demurrer to evidence upon agreed facts and the submission of the whole case, both law and fact, to the judge for decision. The counsel for the appellant can certainly think of no reason why there should be any difference. The judge has nothing to do but apply the law to the facts, and there is surely no reason why he should be asked after he has given the judgment to set aside the very thing he has just done. It is certainly fair to presume that he would do again what under careful consideration of everything before him he has just done. It would almost be contempt to ask him to do so. In the case of the Norfolk and Western Ry. Co. vs. Dunnaway's Administrator, 93 Virginia 29, the court says: "It is not necessary for a motion for a new trial to be made in the trial court in order to have a judgment on a demurrer to evidence reviewed in the appellate court;" and in the same report on page 138 the court says: "Upon a demurrer to the evidence it is not necessary to move for a new trial in the trial court in order to review the judgment in the appellate court."

See also Ruble vs. Seab. Ry., decided Jan. 21, 1904.

So it seems clear to the counsel for this petitioner that in the case now presented to your honors, it was not and is not necessary to ask for the bill of exceptions, but they did — the precaution, both during the term of the court, which went awry by fault of the clerk, and again within the thirty-day limitation herein above referred to, and therefore they think they are properly before this court with this petition and record.

We come now to call the court's attention to the only two cases which were used in the court below in the argument of this case. The plaintiff relied on the Reynolds case, 100th Virginia, above referred to, and the defendant relied on the Hanley case, 187 U. S., also above referred to, and the court of a necessity must have followed the ruling in the Reynolds case, decided under the old constitution and before the Hanley case had been decided, because had it followed the Hanley decision, there would of necessity have been a judgment for the defendant company.

As above stated the Reynolds case cited as authority The Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S. 192, and that case held that transportation from one point in a State to another point

6 in the same State, although the railroad line looped out of the State into another State, and back into the original State, thus having the initial point and the final point in the same State,

but the loop in a foreign State, did not impress the transportation with the character of inter-state commerce.

Your petitioner contended before the court that at the time of the decision of the Reynolds case under the ruling of the Lehigh Valley R. R. case, the propositions therein made by the learned judge, might have been correct, but that the Hanley case, decided seven or eight months after the Reynolds case, made a new rule of law about the road looping out of and back into the same State, and in effect overruled the Lehigh Valley case, and the case based on it.

The court will please observe before we commence to quote from the Hanley case that in the second line of the syllabus the word "Arkansas" ought to be in the place of the word directly after "*Grannis*," which word is, as we can best read now through the ink correction which we have made in our volume "*Kansas*." The correction will readily be made by reference to the last two words in the fifth line from the bottom and the first word in the fourth line from the bottom on p. 618. Grannis is in Ark., not in Kansas. In this case Mr. Justice Holmes in delivering the opinion of the court quoted from Mr. Justice Field in the case of Pacific Coast &c., vs. R. R. Coms., 9 Sawr. 253, and the language quoted is as follows:

"To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State."

9 Sawyer, 258.

And a little further on in the same case, Justice Holmes refers to the Lehigh Valley case, and says that the cases above cited, contrary to the law just quoted, were "decisions made simply out of deference to the conclusions drawn from Lehigh Valley R. Co. vs. Pennsylvania, 145 U. S., 192, and we are of opinion that they carry their conclusions too far.

That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders.

145 U. S., 204.

7 And although it was intimated that for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the State." Such a proportioned tax had been sustained in the case of commerce admitted to be interstate.

142 U. S., 217.

Whereas it is decided, as we have said, that when a rate is established it must be established as a whole. We are of the opinion that the language we have quoted from Mr. Justice Field is correct, and that the decree of the circuit court should be affirmed."

It is true that the Hanley case on page 619 does say: "We may as well add in this connection that the present railroad gets the authority for its line in the Indian Territory, through a predecessor in title from an act of Congress 1893, c. 169, 27 Stat. 487, and that by that act Congress 'reserves the right to regulate the charges for freight and passengers on said railroad until a State government shall be authorized to fix and regulate the cost,' etc., but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State." So it may be contended that this particular case makes the transportation on that particular road subject to the law of Congress, but in reply to that it may be observed that Congress can certainly not regulate or manage interstate commerce any further or any more positively by a *special act* than the Constitution of the United States *orders* and directs it to do when in article I., section 7, sub-divs. 3, it gives Congress exclusive right "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

This we believe is the correct quotation from the Constitution of the United States where it confers the powers upon Congress; and Congress in granting privileges, or making regulations for railroad companies within the Territories certainly could not go beyond the limitations of the Constitution, and it is therefore submitted that the Hanley case is the same in legal effect as it would have been had the last quotation from it not been incorporated in the case.

With this statement of the law and facts, as understood by the petitioner, it is humbly submitted that the telegram delivered to be sent from Danville, Va., to Pocahontas, Va., to a company whose
8 only possible and proper route was to send it by Richmond, Va., and from Richmond, Va., to Bluefield, West Va., and from Bluefield, West Va., to Pocahontas in Virginia again, and the message was lost at Bluefield, West Va., outside of the State of the sending and receiving points, under the ruling in the Hanley case; stamps the transmission with the character of interstate commerce, and therefore sections 1291 and 1292 of the Virginia Code, seeking to regulate such transportation is contrary to the Constitution of the United States, which commits this matter to the hands of Congress, and therefore this case now presented to the court ought to have been decided by the lower court in favor of the defendant company.

Upon the facts herein above stated and under the law, as your petitioner is advised the law is, in such a case, your petitioner assigns the following errors as committed and done by the corporation court of Danville, Virginia, in rendering the judgment herein above complained of.

1. The said court erred in not holding that the usual charges for the telegram sent by Hughes had not been paid by him as required by law, and therefore judgment should have been rendered for the defendant company.

2. The said court erred in not holding that the transmission of the said message from Danville, Virginia, to Pocahontas, Virginia, by Bluefield, West Virginia, where it was lost, was interstate commerce, and therefore the sections herein above referred to were repugnant to the Constitution of the United States, and on that ground judgment should have been rendered for the defendant company. The defendant company therefore humbly prays that your honors will grant a writ of error and supersedeas to the judgment aforesaid, and that the same may be reviewed and reversed by this court. And as in duty bound your petitioner will ever pray, etc.

BERKELEY & HARRISON,
Attorneys for Petitioner.

I, L. C. Berkeley, Jr., a counsel, practicing in the supreme court of appeals of Virginia, do hereby certify that, in my opinion, the judgment of the corporation court of Danville, Va., set forth in the record presented with this petition, should be reviewed by the supreme court of appeals of Virginia.

L. C. BE-KELEY, JR.

9 MEMO.—The judgment is only for $100 and interest and costs and therefore the supersedeas bond need not be more than $150.

BERKELEY & HARRISON.

Returned to me February 15, 1904.

H. STEWART JONES, C. C.

Pleas Before the Judge of the Corporation Court of Danville, at the Courthouse Thereof, on the 9th Day of January, 1904.

Be it remembered that heretofore, to-wit: on the 10th day of November, 1903, came C. E. Hughes, by his attorney and sued out of the clerk's office of said court a summons against the Western Union Telegraph Company, a corporation, which summons with the return thereon, is in the following words and figures to-wit:

"Summons."

The Commonwealth of Virginia to the sergeant of the city Danville, Greeting:

We command you to summon the Western Union Telegraph Company, a corporation, if it be found in your bailiwick, to appear at the rules to be held in the clerk's office of the corporation court of Danville, on the first Monday in December, 1903, to answer C. E. Hughes, of a plea of debt for $100 and have then there this writ.

Witness, John R. Cook, clerk of our said court, at the courthouse thereof, this 10th day of November, 1903, and in the 128th year of the Commonwealth.

JOHN R. COOK, Clerk.

"Return."

Not finding the president, or any other person in the city of Danville, Virginia, upon whom this process can be served under
10 section 3225 Code of Virginia, 1887, except T. P. Kinney, manager of the Western Union Telegraph Company at Danville, Virginia. I delivered said Kinney, manager as aforesaid, a true copy of the within summons on the 10th day of November, 1903, within the city of Danville, Virginia, where said Kinney resides, within my bail-wick.

Fee 50 cents.

P. H. BOISSEAU, Sergeant.

And at another day to-wit: at rules held in the clerk's office of the corporation court of Danville, on the first Monday in December, 1903, came the plaintiff, by his attorney and filed his declaration against the said defendant, which declaration, is in the following words and figures, to-wit:

"Declaration."

In the Corporation Court of the City of Danville, Virginia.

C. E. Hughes, complainant, complains of The Western Union Telegraph Company, defendant, a corporation duly chartered and doing business as a telegraph company, in the State of Virginia, of a plea, that it render unto the said plaintiff the sum of one hundred dollars ($100), which it owes to and unjustly detains from him, for this, to-wit: That the plaintiff, who resides in the city of Danville, Virginia, on the 2nd day of November, 1903, at 8 o'clock a. m. of that day, then and there delivered to the said defendant company, a corporation doing business in the State of Virginia, a message in the following words and figures, to-wit: "November 2nd, 1903. Miss Isabelle Malone, Pocahontas, Va., care Pocahontas inn. Mother taken sick Saturday night, am afraid fatal attack, wrote yesterday, come if can. C. E. Hughes." Said message was to be transmitted by the said defendant to the said town of Pocahontas over its own lines, and to be delivered to the said Miss Isabelle Malone, who was at that time living at Pocahontas inn, at Pocahontas, Va.

That the said message was duly received by said defendant company, on the 2nd day of November, 1903, at 8 o'clock, a. m., to wit: in the city of Danville, Va., and all charges for sending and delivering the said message at its place of designation according to the regulations of the said defendant company were then and there prepaid by the said plaintiff to the said defendant company, and the plaintiff avers that it was the duty of the said
11 defendant company, then and there to faithfully, impartially and promptly send and deliver the said message to the said

Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Va. And the *the* said plaintiff avers that the said defendant company received the said message and undertook and agreed to transmit the same faithfully, impartially and as promptly as practicable, to the said Miss Is-belle Malone, at Pocahontas inn, in Pocahontas, Va. The payment of the usual charges therefor according to the regulations of the said company had been made to the said company as aforesaid, and the plaintiff avers that it was the duty of the said defendant company to transmit the said message faithfully, impartially and as promptly as practical to the said Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Virginia. Yet the said plaintiff avers that the said defendant company wholly failed to discharge its duty in this regard to the plaintiff, and did not faithfully and impartially and as promptly as practicable transmit the said message to the said Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Va., and in consequence of the said breach of duty on its part and of its failure so transmit faithfully, impartially and promptly as practical the said message *of* the said defendant company, under the statutes in such case made and provided, became indebted to the said plaintiff in the sum of one hundred dollars ($100), to be paid to the plaintiff whenever the said *defendant* should thereunto after request.

The said C. E. Hughes further complains of the said Western Union Telegraph Company, of a plea that it render unto him the sum of one hundred dollars ($100) which it owes to him and unjustly detains from him, for this, towit: That at the time of, and before the action herein stated arose the said defendant was a duly chartered telegraph company, doing business in this State, with the duty imposed upon it by the law of receiving and transmitting dispatches promptly as directed, and upon the arrival of a dispatch at the point to which it was to be transmitted, to cause the same to be forwarded to the person to whom the same was addressed, or his agent, and upon the payment of the charges due on such dispatch to deliver it promptly to the person to whom it was addressed, provided such person resided within the city or corporate town of which such station was, or that at such point the regulations of the said company require such delivery. The plaintiff avers that on November 2, 1903, *that* he wrote the following dispatch:

"November 2, 1903, Miss Isabelle Malone, Pocahontas, Va., c-o Pocahontas inn. Mother taken sick Saturday night; am afraid fatal attack, wrote yesterday; come if can. C. E. Hughes."

12 That he carried this dispatch to the defendant company in the city of Danville, Virginia, and delivered the same to the agent of said company, and paid all charges required by the said company for receiving, transmitting and delivering the said dispatch to Miss Isabelle Malone, Pocahontas, Va., c-o Pocahontas inn, at which point the regulations of the company required dispatches to be promptly delivered to the person to whom it was addressed, the said place of delivery being within an incorporated town, in which the defendant's station was. That the said dispatch

did arrive at said place of delivery, to wit: at the town of Pocahontas, Va., and when the same did arrive, the said defendant company failed and refused to deliver said dispatch to said Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Va., as promptly as practicable, but held the same, and did not deliver it at all, and the plaintiff avers, that the defendant knew the contents of this dispatch, and knew that the occasion of sending the same would be defeated unless promptly delivered when received, and so the plaintiff avers, that by reason of the failure of the defendant to deliver the aforesaid dispatch as promptly as practicable, the said defendant company became indebted under the statutes in such case made and provided to the plaintiff, and has forfeited to the said plaintiff the sum of $100, to be paid to the plaintiff whenever the said defendant company should be thereunto afterwards requested. Yet the said defendant, although often requested, has not yet paid to the plaintiff the said sum of $100, as above demanded, or any part thereof, but to pay the same has hitherto wholly failed and refused, and still doth refuse, although the said plaintiff, according to the regulations of the said company, did present the claim in writing within 60 days to said company, after the said message was filed with the company for transmission, to the damage of the said plaintiff $100, and therefore he brings his *brings his* suit.

THOS. HAMLIN, *f. c.*

Whereupon the said defendant being duly summoned, and not appearing, on motion of the plaintiff it is ordered that judgment be entered for the plaintiff against the said defendant for the debt in the declaration mentioned, unless the said defendant shall appear and plead to issue at the next rules.

And at another day, to wit: at rules held in the clerk's office of the corporation court of Danville on the third Monday in December, 1903.

13 This day came the parties, their attorneys, thereupon the said defendant filed a written demurrer to the plaintiff's declaration, and the plaintiff joined therein, and at the same time filed a written plea of *nil debit* to said declaration.

And of this it puts itself upon the country and the plaintiff doth the like.

"Written Demurrer of Defendant."

Second Rules in December, 1903.

CHARLES E. HUGHES
against
WESTERN UNION TELEGRAPH CO.

Demurrer to Declaration.

The said defendant company comes and says that the declaration is not sufficient in law, and therefore the said defendant company demurs to the said declaration, and to each and every count thereof.

BERKELEY & HARRISON,
Attorneys, *p. d.*

Danville, Va., Dec. 17, 1903.

"Written Plea of *Nil Debit* of Defendant."

Second Rules in December, 1903.

CHARLES E. HUGHES
against
WESTERN UNION TELEGRAPH CO.

Plea of *Nil Debit.*

And the said defendant company, by its attorneys, comes and says that it does not owe the said sum of one hundred dollars, ($100) or any part thereof, in manner and form as the said plaintiff hath in his declaration above thereof complained.

14 And of this the said defendant company puts itself upon the country.

BERKELEY & HARRISON,
Attorney-, *p. d.*

Danville, Va., December 17, 1903.

And now at this day, to-wit: at a corporation court of Danville, held at the courthouse thereof on the 9th day of January, 1904, being the day and year first herein mentioned.

This day came the parties by their attorneys, thereupon the defendant's demurrer to the plaintiff's declaration having been considered by the court, is overruled, and neither party desiring a jury the court proceeded in lieu of a jury to try the matter in controversy, and issue joined, and having heard the evidence adduced, finds for the plaintiff, and gives judgment in his favor for the amount claimed in the declaration and the costs.

Therefore it is considered by the court that the plaintiff recover against the defendant one hundred dollars, with interest thereon from today, to-wit: the 9th day of January, 1904, at the rate of six

per centum per annum, till payment, the debt and interest aforesaid, and his costs by him about his suit in this behalf expended.

And at another day to-wit: at the same court continued and held at the courthouse thereof on the 19th day of January, 1904.

This day came again the parties by their attorneys, and the defendant intimating to the court its intention to apply to the supreme court of appeals of Virginia, for a writ of error and supersedeas to the judgment rendered in this cause, at a former day of this term, it is therefore ordered that said judgment be suspended for sixty days, upon the said defendant or some one for it, executing before the clerk of this court bond with approved security in the penalty of $150 payable and conditioned according to law.

And at another day, to-wit, at a corporation court of Danville, continued and held at the courthouse thereof on Tuesday the 2nd day of February, 1904.

This day came again the parties by their attorneys, and the defendant having excepted to opinions of the court given upon
15 the trial of this cause and this day tendered its bill of exceptions and certificate of facts, which were severally received, signed and sealed by the court, and ordered to be made a part of the record in this cause.

"Bill of Exceptions."

In the Corporation Court of Danville, Va.

C. E. HUGHES
vs.
WESTERN UNION TELEGRAPH COMPANY.

In Debt.

Be it remembered that at the January, 1904, term of this court this case came on for trial, and both parties waived a jury and submitted all matters of law and the facts of the case agreed by both parties to the judge of the court for decision, and thereupon at the same term of the court the said judge gave judgment for the plaintiff (here insert the judgment), and the court afterwards adjourned on the 21st day of January, 1904, and this day, the 2nd day of February, 1904, the defendant company moved the court to set aside the said judgment and grant a new trial of the case because the facts in the case show that the transmission of the message set out and copied in the declaration in this case is interstate commerce and not subject to the control or regulation of sections 1291 and 1292 of the Code of Virginia of 1887, or of either of them, and at the same time and for the same reason the said defendant company moved the court to arrest the said judgment, but the court over-

ruled both of the said motions, and to this action of the court the said defendant company excepts and prays that this, its bill of exceptions, may now on this day, the 2nd day of February, 1904, be signed, sealed and made a part of the record of this case, and that the facts of the case may be certified by the judge and made a part of this bill of exceptions. All of which is accordingly done.

A. M. AIKEN, [SEAL.]
Judge of the Corporation Court of Danville, Va.

16 "Certificate of Facts."

In the Corporation Court of Danville, Va.

C. E. HUGHES
vs.
WESTERN UNION TEL. CO.

In Debt.

I, A. M. Aiken, judge of the corporation court of Danville, Va., do hereby certify that the following are all the facts upon which this case was tried, and which are referred to in the bill of exceptions of the defendant company this day signed by me:

1. That the said message from Danville, Va., to Pocahontas, Va., was delivered to the defendant company at Danville, Va., at 8 o'clock a. m. on November 2d 1903.

2. That it was sent to and received at Richmond, Va., at 8:20 o'clock a. m. on November 2d 1903.

3. That it was sent from Richmond, Va., to Bluefield, W. Va., and was received at said Bluefield, W. Va., at 9:05 a. m. on the said 2d day of November 1903.

4. That the said message was never received at Pocahontas, Va., and was never delivered to the sendee, Miss Isabelle Malone, at Pocahontas inn, Pocahontas, Va., or to any one for her, or to her at any other place, but it was sent by the only possible and proper route from Danville, Va., to Pocahontas, Va.—that is, by Bluefield, W. Va.

5. That the plaintiff C. E. Hughes had an account with T. P. Kinney, the agent of the defendant company at Danville, Va. that telegrams sent by the said Hughes should be charged to him on said account, and although the said Hughes did not pay for the said telegram at the time of delivery at Danville, Va., yet it was charged in said account and was afterwards paid for by said Hughes before this action was brought.

Given under my hand and seal this the 2d day of Feb'y 1904.

A. M. AIKEN, [SEAL.]
Judge of the Corporation Court of Danville, Va.

17 STATE OF VIRGINIA, City of Danville, } *To wit:*

I, Jno. R. Cook, clerk of the corporation court of Danville, in the State of Virginia, do hereby certify that the foregoing is a true transcript of all the record and judicial proceedings of said court in a certain action of debt, lately pending in said court between C. E. Hughes, plaintiff, and the Western Union Telegraph Company, a corporation, duly chartered and doing business as a telegraph company, in the State of Virginia, defendant.

And I also certify that the defendant said Western Union Telegraph Company, has filed a written notice to the plaintiff of its intention to apply for a transcript of said record, which notice was duly accepted by plaintiff's attorney.

Given under my hand this the 12th day of February, 1904.

JNO. R. COOK, Clerk.

Fee of clerk of corporation court of Danville, Va., for making up, copying and certifying record, $5.50. Charged to defendant.

JNO. R. COOK, Clerk.

Copy.
Teste: H. STEWART JONES, C. C.

18 The Commonwealth of Virginia to the — of the — of —, Greeting:

We command you, that from all further proceedings on a judgment pronounced by the corporation court of the city of Danville, Va., on the 9th day of January 1904, in a suit in which C. E. Hughes was plaintiff, and Western Union Telegraph Company, was defendant, you altogether supersede, which judgment before the judges of our supreme court of appeals, in city of Richmond, for cause of error in the same to be corrected, on the petition of the said defendant we have caused to come. We also command you, that you give notice to the said plaintiff that he be before the judges of our said supreme court of appeals, at the city aforesaid, on the first Monday in March next, then and there to have a regearing of the whole matter in the judgment aforesaid contained. And have then there this writ.

Witness—H. Stewart Jones, clerk of our said supreme court of appeals, at Richmond, this 20th day of February 1904, and in the 128th year of the Commonwealth.

H. STEWART JONES, C. C.

Memo.—The above writ of supersedeas is not to be effectual until the petitioner, or some one for it, shall enter into bond, with sufficient security in the clerk's office of the said corporation court, in the penalty of three hundred dollars, conditioned as the law directs, and a certificate of the execution thereof, together with the name or

names of the security or securities, shall be endorsed hereon by the clerk of the said court.

Teste: H. STEWART JONES,
Court Clerk.

(Endorsed.)

Clerk's Office Corporation Court, Danville, Va.

I, Jno. R. Cook, clerk of the corporation court of Danville, Va., hereby certify that L. C. Berkley, Jr., for and in the place
19 and stead of the Western Union Telegraph Company, has this day executed before me bond in the penalty of $300.00 payable and conditioned according to law, as required by the within writ, with T. P. Kinney, his surety, which security is considered by me as sufficient.

Given under my hand this 23rd Feb'ry, 1904.

JNO. R. COOK, Clerk.

I hereby accept legal service of this writ this day, Feb'y 24, 1904.

C. E. HUGHES,
By THOS. HAMLIN, His Att'y.

Feb'y 24/04.

20 WESTERN UNION TELEGRAPH Company v. HUGHES. } Dissenting Opinion by Judge R. H. Cardwell. Keith, P., Concurs.

I am unable to concur in the opinion of the court in this case. The case, upon the agreed state of facts, is, as the opinion states, in all essential features the same as that of W. U. Tel. Co. v. Reynolds, 100 Va., 459, decided June 19, 1902. In each case the action was to recover against the defendant the penalty of one hundred dollars, imposed by sections 1291 and 1292 of the Code of Va. for the failure to transmit and deliver dispatches in the manner and time set forth in those sections. In the former case the message was received by the telegraph company at Radford, Va., while in the present it was received at Danville, Va.; the first was addressed to the sendee at Tom's Creek, Va., and the second to a sendee at Pocahontas, Va., and both were lost at Bluefield, W. Va., where the telegraph company has a relay office, the only route by which the message in either case could be transmitted to its point of destination being via Bluefield W. Va.

That it is settled law, that a telegraph line is an instru-
21 ment of commerce, and that telegraph companies like railroad companies are subject to the regulating power of Congress in respect to their foreign and interstate business, see Postal Tel.-Cable Co. v. Umstadter, 50 S. E., 259; 103 Va., —, and authorities there cited.

This court having in W. U. Tel. Co. *v.* Tyler, 90 Va. 297, and W. U. Tel. Co. *v.* Bright, *ibid.* 778, held that section 1292 of the Code, as applied to a case where the telegram in question was a domestic message, *were* not in conflict with the Constitution of the United States, or any act of Congress passed in pursuance thereof; and construing, as have the courts of other States, the decision of the Supreme Court of the United States in Lehigh Valley R. Co. *v.* Penn., 145 U. S. 192, as authority for the proposition that where both the point at which a telegram is received for transmission and the point to which it is addressed are in the same State, although the line over which the transmission is made passes into another State between the points, the penalty prescribed by the statute may be imposed for the default of the telegraph company occurring in the foreign State, as a reasonable exercise of the police power of the State and not an attempt to regulate commerce violative of the Federal Constitution, the telegram being regarded as a domestic message, dismissed the case of W. U. Tel. Co. *v.* Reynolds,
22 *supra*, the amount involved not being large enough to give jurisdiction to the court.

The opinion by Whittle, J., after stating that the State of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same State, that is to say, passing out of Pennsylvania into another State and back again into Pennsylvania, in the course of transportation, and that the Lehigh Valley R. Co. had no road of its own from Mauch Chunk, Pa., to Philadelphia, but in transporting its coal, and general freight traffic, it used its own line from Mauch Chunk to Phillipsburg, N. J., from which point it was, under an arrangement for a continuous passage with the Pennsylvania R. Co., transported by the latter road via Trenton to Philadelphia and that it was insisted that the State could not tax that part of the gross receipts derived from so much of the transportion as was wholly within the State of Pennsylvania, because the freight, during its entire transportation was impressed with the character of interstate commerce, quotes from the opinion in Lehigh Valley R. Co. v. Pennsylvania, *supra*, as follows: "Commerce undoubtedly is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is
23 regulated by prescribing rules for carrying on that intercourse * * * (Gibbons v. Ogden, 22 U. S.—9 Wheat. 189) * * * The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed. Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph onto the soil of another State? * * *

It is simply whether, in the carriage of freight and passengers between two points in the same State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk. * * * We will observe, however, that we think that the principle laid down by that (the trial) court is peculiarly adapted to cases like the present, in which there is such an exceptional facility for the evasion of State authority to fix the rate of charges. This may be done in an instant and
24 without expense, by so adjusting the wires that messages must go through a part of the territory of another State."

In the more recent case, however,—Hanley v. Kansas City So. R. Co., 187 U. S. 617—the Supreme Court of the United States gave its own interpretation of the opinion in Lehigh Valley R. Co. v. Pennsylvania, *supra*, and held that the railroad commission of Arkansas could not without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the State of Arkansas, where a large part of the route is outside of the State, through the Indian Territory or Texas. The opinion, by Mr. Justice Holmes, says: "It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress (Lord v. Goodall, N. & P. S. S. Co., 102 U. S. 541; 26 L. ed. 224), and is not subject to regulation by the State (Pac. Coast S. S. Co. v. R. R. Com'rs, 9 Sawy. 253, 18 Fed. 10); and, although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. 'To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must
25 be within the entire voyage under the exclusive jurisdiction of the State.' 9 Sawy. 258—19 Fed. 10." A number of other decisions are also cited as being in point.

The court having, in Hanley v. Kansas City So. Ry. Co., *supra*, held that the transportation of goods on a through bill of lading from Fort Smith, Arkansas, to Grannis, Arkansas, over a line of railroad by way of Spiro, in the Indian Territory, a total distance of one hundred and sixteen miles, of which fifty-two miles *is* in Arkansas and sixty-four in the Indian Territory, is interstate commerce, subject to regulation by act of Congress only, the controlling question in the case at bar is, Does the doctrine apply with equal force to a telegraphic dispatch to be transmitted from Danville, Va., to Pocahontas, Va., by way of Bluefield, W. Va., that being "the only possible and proper one from Danville, Va., to Pocahontas, Va.,—that is, by way of Bluefield, West Va.," and the default of the telegraph Co. in transmitting and delivering the dispatch occurring wholly within the State of W. Va.?

As we have seen, it is settled law that a telegraph company oc-

cupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods, both companies being regarded as instruments of commerce and their business com-
26 merce itself. While they do their transportation in different ways, and their liabilities are in some respects different, they are both regarded as indispensable to those engaged to any extent in commercial pursuits. Telegraph Co. v. Texas, 105 U. S. 460 (L. ed. 1067), and W. U. Tel. Co. v. Pendleton, 122 U. S. 356 (L. ed. 1167).

The opinion in Hanley v. Kansas City So. Ry. Co., *supra*, approving the language employed by Mr. Justice Field I have quoted above and citing a number of cases regarded as in point, proceeds as follows: "There are some later State decisions contrary to those last cited. Campbell v. Chicago, Milwaukee & St. Paul Ry. Co., 86 Ia. 587; Seawell v. Kansas City, Fort Scott & Memphis Rd. Co., 119 Mo. 222; Railroad Commissioners v. Western Union Tel. Co., 113 N. C. 213. But these decisions were made simply out of deference to conclusions drawn from Lehigh Valley Railroad Co. v. Pennsylvania, 145 U. S. 192, and we are of opinion that they carry their conclusions too far. * * *"

One of the cases disapproved in Hanley v. Kansas C. &c. Co., *supra*, is Campbell v. Chicago &c. Ry. Co., *supra*, holding that "an act of the legislature, providing that regulations fixing maximum rates of freight that may be charged by railroad companies for the transportation of property between points within the State of Iowa should be applicable whether such transportation shall be
27 wholly within this State or partly within this State and an adjoining State or States, is not in conflict with sec. 8 of art. 1 of the U. S. Constitution as being a regulation of commerce."

Another is Railroad Com'rs v. W. U. Tel. Co., 113 N. C. 213, *supra*, (cited in W. U. Tel. Co. v. Reynolds, *supra*), where it was held that telegraph messages transmitted by a company from and to points in the State, although traversing another State in the route, do not constitute interstate commerce and are subject to the tariff regulations of the commission.

While the court, in Hanley v. Kansas C. &c. Co., *supra*, referring to the case of Lehigh Valley &c. Co. v. Pennsylvania, *supra*, says "that was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders," thus recognizing the distinction indicated in Pac. Coast S. S. Co. v. Rd. Com's, *supra*, the only reasonable conclusion to be drawn from the opinion, as it appears to me, is, that the doctrine there announced has full and complete application to the transmission of a telegrapic dispatch from one point in a State to another point in the same State, traversing another State in its route, where the default in transmitting and delivering the dispatch occurred wholly within the foreign State.

28 Unlike the case of W. U. Tel. Co. v. James, 162 U. S. 650, where the default of the telegraph company occurred wholly

in the State of Georgia, and that of Postal Tel.-Cable Co. v. Umstadter, *supra*, where the default took place in this State, the meaning of the certificate of facts in the case at bar is, that the message was delivered to plaintiff in error at Danville, Va., to be transmitted to Pocahontas, Va., and could not be transmitted from its point of origin to its point of destination without passing through the territorial limits of the State of West Virginia; that the message was transmitted by plaintiff in error from Danville, Va., to Richmond, Va., and from Richmond to Bluefield, W. Va., and that it was received at Bluefield where it was last heard from; it thus appearing that the default of plaintiff in error, for which the penalty prescribed by the statute is imposed in this case, occurred wholly within the State of West Virginia.

I am of opinion that upon this state of facts this court is bound by the decision of the Supreme Court of the United States in Hanley v. Kansas City &c. Co., *supra*, to hold that the statute, in so far as it authorizes the imposition of the penalty in such a case, transcends the police power of the State and violates sec. 8, art. 1, of the Constitution of the United States.

29 Corporation Court of City of Danville.

WESTERN UNION TELEGRAPH COMPANY v. HUGHES. } Opinion by Judge Stafford G. Whittle.

WYTHEVILLE, VA., June 22, 1905.

The facts in this case are essentially the same as in the case of Western Union Telegraph Company v. Reynolds, reported 100 Va., 459, where the court sustained a judgment against the company for the statutory penalty, for failure to transmit and deliver a telegram, the initial and terminal points of which were both within the State of Virginia, notwithstanding the circumstance that the line passed in part over the territory of another State.

It is insisted, however, by counsel for plaintiff in error that this doctrine has been overruled by the decision of the Supreme Court of the United States in the more recent case of Henley v. Kansas City So. R. Co., 187 U. S. 617.

We cannot assent to that contention. In the last named case the court merely decided that the railroad commission of the State of Arkansas could not, without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of freight between two points in the State of Ar-
30 kansas, where a large part of the route is outside of the State through the Indian Territory or Texas. The distinction between that case and the case at bar is obvious. In the latter there is no attempt to fix and enforce rates for the transmission of telegrams, but the court simply upheld the recovery of a penalty im-

posed by the statute upon a telegraph company doing business in the State for failure to transmit faithfully and impartially, and as promptly as practicable, a telegram, in accordance with its contract. This principle was distinctly recognized and sustained by the Supreme Court of the United States in construing a similar statute of the State of Georgia, in the case of Western Union Telegraph Company v. James, 162 U. S. 650, the authority of which is in no wise impaired by the case referred to.

It is true that this court, in the Reynolds case, cited and relied on Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, as analogous authority. But it will be observed that that case, like the case of Hanley v. Kansas City So. R. Co., involved the power of a State to fix the rate of taxation upon the receipts of a railway company "for the mileage within the State, from transportation by continuous carriage from a point in the State, but over a line which, in its course between these points, passed out of the State into another State
31 and back again into the State." It was that doctrine and not the principle of the James case that has been modified by the recent decision of the Supreme Court of the United States.

The case in judgment, in our opinion, involves the exercise of an important police power of the State, a power which ought not to be surrendered and which we are unwilling to surrender in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the Federal Constitution.

For these reasons the court will adhere to its former decision and dismiss the case for want of jurisdiction.

32 VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals in the City of Richmond, on the 3rd day of July, 1905.

The following copy of an order of this court, entered at its place of session at Wytheville was this day received by the clerk here and is as follows:

"VIRGINIA:

In the Supreme Court of Appeals, Held at the Court House of Wythe County, in the Town of Wytheville, on Thursday, the 22nd day of June, 1905.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
C. E. HUGHES, Defendant in Error.

Upon a Writ of Error and Supersedeas to a Judgment Rendered by the Corporation Court of the City of Danville on the 9th Day of January, 1904.

This cause, which is pending in this court at its place of session at Richmond, having been fully heard but not determined at said place of session, this day came here the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion for reasons stated in writing and filed with the record that the writ in this case was improvidently awarded and that this court hath no jurisdiction to entertain the same. It is therefore considered by the court that this writ of error be dismissed and that the plaintiff in error pay to the defendant in error damages according to law and his costs by him in this behalf herein expended.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Richmond, who will enter this order in the order book there and certify it to the said corporation court of the city of Danville.

A copy,
Teste: J. M. KELLY, C. C.

33 In the Supreme Court of Appeals of Virginia, at Richmond.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I, H. Stewart Jones, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing printed record contained in seventeen pages and one page of index, and fourteen additional manuscript pages, is a true and perfect transcript of the record of the suit in the case of Western Union Telegraph Company against C. E. Hughes remaining in the clerk's office of the said court at the city of Richmond, Virginia, upon which said record the said case was heard, tried and determined by the court aforesaid.

In witness and attestation whereof I hereunto set my hand and

affix the seal of said court at Richmond, Virginia, on this the 11th day of August, 1905.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of the
State of Virginia, at Richmond.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I, James Keith, one of the judges and president of the supreme court of appeals of Virginia, do hereby certify that the attestation of the above record of Western Union Telegraph Company against C. E. Hughes, remaining in the clerk's office of the said court at Richmond, Virginia, made by H. Stewart Jones, the clerk of said court at Richmond, aforesaid, is in due form.

Given under my hand and seal this the 11th day of August, 1905.

JAMES KEITH,
President Supreme Court of Appeals of Virginia.

34 In the Supreme Court of Appeals of Virginia.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
C. E. HUGHES, Defendant in Error.

Assignment of Errors.

The Western Union Telegraph Company, plaintiff in error, comes and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above entitled cause and makes the following assignment:

The supreme court of appeals of Virginia erred (1) in failing to reverse the judgment rendered by the corporation court of Danville (Virginia) in favor of C. E. Hughes against the Western Union Telegraph Company for one hundred dollars with interest and costs; (2) erred in holding that the writ of error awarded by it (the said supreme court of appeals of Virginia) in the above styled case was improvidently awarded; and (3) erred in holding that it had no jurisdiction to entertain said writ of error. The said supreme court of appeals of Virginia should have reversed the said judgment rendered by the corporation court of Danville, (and should have entered judgment in favor of the plaintiff in error:) The said judgment was controverted and drawn in question by the plaintiff in error on the ground that said judgment was and is repugnant to the Constitution of the United States (article 1, section 8, providing that the Congress shall have power "to regulate commerce with foreign

nations and among the several States and with the Indian tribes) and in contravention thereof in the following particulars:

First. That the supreme court of appeals of Virginia erred in failing to hold that the transmission of the telegraphic dispatch described in this case was interstate commerce and not subject
35 to the control or regulation of sections 1291–1292 of the Code of Virginia, edition of 1887, or either of them.

Second. The supreme court of appeals of Virginia erred (1) in failing to hold that the transmission of said telegraphic dispatch from Danville, Virginia, to Pocahontas, Virginia, by way of Bluefield in the State of West Virginia, where said dispatch was lost,—was interstate commerce; and (2) in failing to hold that said sections 1291–1292, and each of them, of the Code of Virginia, edition of 1887, as applied (*a*) to said telegraphic dispatch, (*b*) to its transmission within the State of West Virginia, and (*c*) to its loss within the territorial limits of the State of West Virginia,—were and are repugnant to article 1, section 8 of the Constitution of the United States.

For these reasons the supreme court of appeals of Virginia should have reversed said judgment of the corporation court of Danville and should have rendered judgment in favor of the plaintiff in error.

Third: The said final judgment of the supreme court of appeals of Virginia is erroneous in not holding said judgment, rendered by said corporation court of Danville against the plaintiff in error, to be a regulation of interstate commerce by the State of *State of* Virginia in violation of and repugnant to article 1, section 8 of the Constitution of the United States, which gives to Congress the power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

For which errors the plaintiff in error, the Western Union Telegraph Company, prays:

1. That said judgment of the supreme court of appeals of Virginia, dated the 22nd day of June, 1905, may be reviewed and reversed, and that a judgment may be rendered in favor of the said plaintiff in error and for costs.

2. That said judgment rendered by the corporation court of Danville, Virginia, in favor of C. E. Hughes against the plaintiff in error, the Western Union Telegraph Company, may be reviewed and reversed and annulled, and that a judgment may be rendered
36 in favor of the said plaintiff in error.

3. That all such other and further and general and complete relief as may be proper in the premises may be granted.

WESTERN UNION TELEGRAPH COMPANY,
By A. L. HOLLADAY, Its Counsel.

37 In the Supreme Court of Appeals of Virginia.

WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
C. E. HUGHES, Defendant in Error.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the supreme court of appeals of Virginia in rendering judgment against it in the above entitled case on June 22, 1905, the Western Union Telegraph Company, the plaintiff in error, hereby prays a writ of error and supersedeas from the said decision and judgment to the Supreme Court of the United States. Assignment of errors is hereto attached.

WESTERN UNION TELEGRAPH COMPANY,
By A. L. HOLLADAY, Its Counsel.

Supreme Court of Appeals of Virginia.

Let the writ of error issue upon the execution of a bond by the plaintiff, Western Union Telegraph Company, or some one for it, to the defendant, C. E. Hughes, in the sum of five hundred dollars ($500.); said bond, when approved, to act as a supersedeas.

Dated August 11th, 1905.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

38 WESTERN UNION TELEGRAPH COMPANY, Plaintiff in Error,
against
C. E. HUGHES, Defendant in Error.

Bond.

Know all men by these presents, that we —— —— as principal and the Virginia Trust Company, a corporation chartered and existing under the laws of the State of Virginia, as surety, are held and firmly bound unto C. E. Hughes in the sum of five hundred dollars to be paid to said C. E. Hughes, to which payment, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of August, 1905.

Whereas, The Western Union Telegraph Company, plaintiff in error in the above entitled cause, seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled case by the supreme court of appeals of Virginia.

Now, therefore, the condition of this obligation is such that if the

above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

JOHN S. CALVERT. [SEAL.]
VIRGINIA TRUST COMPANY.
[SEAL.] By L. D. AYLETT, Sec't'y.

39 STATE OF VIRGINIA, City of Richmond, } *ss:*

Lewis D. Aylett, secretary of the Virginia Trust Company, the surety named in the foregoing bond, being first duly sworn, deposes and says as follows:

I am the secretary of the Virginia Trust Company, whose name is subscribed to the foregoing bond, and whose seal is affixed thereto, and I state that the said Virginia Trust Company, is worth the sum of five hundred ($500.00) dollars named therein, as the penalty thereof, over and above all its just debts and liabilities, exclusive of property, which is exempt from execution, and that the execution of the foregoing bond is duly authorized by law, and also by a resolution of the board of directors of the said Virginia Trust Company.

LEWIS D. AYLETT,
Secretary Virginia Trust Company.

Sworn and subscribed to before me this 10th day of August, 1905.

JNO. H. SOUTHGATE,
Notary Public.

My commission expires Feb. 25, 1905.

The foregoing bond is approved.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of appeals of Virginia on August 11, 1905, and the following endorsement made thereon: Bond. Filed August 11, 1905.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

40 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of appeals of the State of Virginia, before you, or some of you, being the

highest court of law or equity of the said State in which a decision could be had in the said suit between The Western Union Telegraph Company, plaintiff in error, and Charles E. Hughes, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Western Union Telegraph Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
41 the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at the city of Washington, District of Columbia, on the 9th day of September, 1905, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 11th day of August, in the year of our Lord 1905.

[Seal United States Circuit Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk United States Circuit Court for
the Eastern District of Virginia.

Allowed by

JAMES KEITH,
President of the Supreme Court
of Appeals of Virginia.

The original of the foregoing writ of error was lodged with the clerk of the supreme court of appeals of Virginia on August 11th, 1905, and also at the same time and place a copy thereof for *the* C. E. Hughes. The following endorsement was made upon the said

original writ and upon the copy: Writ of error. Filed, August 11th, 1905.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

42 [Endorsed:] Writ of error. Filed Aug. 11, 1905 Western Union Tel. Co. v. Hughes.

43 Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Charles E. Hughes, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of appeals of Virginia, at Richmond, wherein you are defendant in error and The Western Union Telegraph Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the president of the supreme court of appeals of Virginia, this 11th day of August, 1905.

JAMES KEITH,
President of the Supreme Court of Appeals of Virgin

Attest: H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

A copy.
Teste: H. STEWART JONES, C. C.

44 Executed by delivering Charles E. Hughes a true copy of the within citation on the 14th day of August 1905 within my bailiwick.

P. H. BOISSEAU,
Sergeant of the City of Danville, Va.

Fee 50 cts.

45 Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, } *ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court of appeals, in the city of Richmond, this 11th day of August, 1905.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

_____,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

Costs of this record:
$16.98, paid by Western Union Telegraph Company.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

Endorsed on cover: File No. 19,913. Virginia supreme court of appeals. Term No. 411. The Western Union Telegraph Company, plaintiff in error, vs. Charles E. Hughes. Filed September 29th, 1905. File No. 19,913.